STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,

Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees.

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL - STATE OF MICHIGAN AS APPELLEE

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

The jurisdictional summary provided by Appellants Taxpayers of Michigan Against Casinos and from Representative Laura Baird (jointly, "TOMAC") is incorrect. Correctly stated, this Court has jurisdiction to review the decision and order of the Court of Appeals dated November 12, 2002 (App [1] at 17b-30b) reversing in part and affirming in part the decision of the Ingham County Circuit Court dated November 18, 2000 (App at 1b-16b) pursuant to MCR 7.301(A)(2).

[1] "App" as used in this brief refers to the Joint Appendix of Appellees State of Michigan and Gaming Entertainment, LLC.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Where federal law permits states to regulate Indian gaming only through negotiated contracts, and not through unilateral legislation, did the Michigan Constitution preclude the Legislature from ratifying negotiated contracts with four tribes by concurrent resolution, rather than by legislation, where the compacts granted no regulatory power to the State and created no agencies or other public bodies and where Michigan law allows contracts to be approved in that manner?

Circuit Court answered: Yes
Court of Appeals answered: No
The State answers: No
The Intervenor answers: No
Appellants answer: Yes

II. Does the amendment provision in the Compacts, which allows the Governor to agree to certain compact amendments without the Legislature's specific approval, permit the Governor to enact legislation, in violation of the Separation of Powers Clause of the Michigan Constitution where the provision significantly limits the types of amendments to which the Governor may agree, many potential amendments have no policy implications at all and the decision of the Governor, as the chief executive of the State, may be relied upon to conform to the Constitution?

Circuit Court answered: Yes
Court of Appeals answered: No
The State answers: No
The Intervenor answers: No
Appellants answer: Yes

III. Did the Legislature's approval by concurrent resolution of four Tribal-State gaming compacts, which are not legislation, violate art 4, §29 of the Michigan Constitution, which sets forth the procedure for passing a "local" act?

Circuit Court answered: No
Court of Appeals answered: No
The State answers: No
The Intervenor answers: No
Appellants answer: Yes

INTRODUCTION

This Court should affirm the unanimous decision of the Court of Appeals upholding the constitutionality of the Legislature's approval by resolution of four Indian gaming Compacts entered into by the State of Michigan and four Indian Tribes. TOMAC contends that the Compacts are unconstitutional because they are "legislation", which the Michigan Constitution required the Legislature to approve by bill rather than resolution. As the Court of Appeals found, all of TOMAC's arguments for that contention fail.

In support of its position, TOMAC urges throughout its brief that gaming is against the public policy of the State. But in the last thirty years, Michigan's voters have embraced gaming, first, when they amended the State Constitution to remove the ban against a lottery, ushering in the State lottery as Michigan's biggest gaming operation, and, second, when they passed Proposal E, paving the way for the establishment of three casinos in Detroit. In light of these measures, gaming is simply not contrary to Michigan's public policy.

TOMAC not only mischaracterizes Michigan's policy on gaming; it also ignores the special status of gaming on Indian lands. As the Court of Appeals recognized, federal law governs this area. Under the federal Indian Gaming Regulatory Act ("IGRA"), states that permit casino-style gaming, like Michigan, may not unilaterally regulate gaming in Indian country. Rather, their role is limited to the terms that they are able to negotiate in a compact with the tribes consistent with IGRA. That limited role was no secret to Michigan's Legislature. The Michigan Gaming Control and Revenue Act ("MGCRA"), the legislation that codified Proposal E, expressly exempts from its regulatory scheme gaming on Indian lands. Moreover, the Compacts at issue here, unlike those in other states,

granted no regulatory role to the State; the tribes even agreed to post in their casinos a sign stating "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN." None of this, of course, is addressed by TOMAC. But it shows that the Compacts are not proxies for legislation, and therefore that the Legislature acted within constitutional bounds when it approved them by resolution. The Court of Appeals did not err in reaching that conclusion.

The fact that the Compacts are not legislation disposes of TOMAC's argument that both the Circuit Court and the Court of Appeals erred in holding that the Compacts violated the Local Acts provision of the Michigan Constitution. Since that provision applies only to legislation, it does not govern the Compacts. Thus, the courts below did not err in rejecting TOMAC's local acts challenge.

Finally, the amendment provision of the Compacts, which allows the Governor to agree to certain amendments on behalf of the State without the Legislature's specific approval, does not on its face violate the Separation of Powers Clause. TOMAC theorizes that the amendment provision gives the Governor the power to legislate because her agreement to some amendments might be based on policy decisions. But TOMAC has not shown that *all* potential amendments involve policy decisions and that *all* such policy decisions must take the form of legislation; at a minimum, this must be proven to establish TOMAC's *facial* constitutional challenge. Furthermore, the amendment provision itself delineates the range of permissible amendments — those that do not expand the geographic area in which casinos are located. The Governor may choose amendments only within this delineated range. Finally, the Governor's discretion to choose among permissible amendments should be given deference by the courts. This is so because, as the chief executive of the State, the Governor may be relied upon to exercise her discretion within constitutional bounds.

In a unanimous decision, the Court of Appeals correctly rejected TOMAC's constitutional

attacks on the Legislature's approval of the Compacts by resolution. This Court should affirm that decision.

COUNTER-STATEMENT OF FACTS

I. FACTS

A. The Indian Gaming Regulatory Act and Gaming in Michigan

It has been long recognized that Congress has exclusive authority over Indian tribes. The federal Constitution granted Congress the power to "regulate commerce . . . with the Indian Tribes." US Const, Art I, §8, cl 3. Under this Indian Commerce Clause, the federal government, to the exclusion of the states, has plenary power over the Indian tribes. *United States v Kagama*, 118 US 375; 6 S Ct 1109; 30 L Ed 228 (1886). In light of such plenary power, the Supreme Court has held that federal law preempted the states from regulating gaming on tribal lands. *California v Cabazon Band of Mission Indians*, 480 US 202, 216; 107 S Ct 1083; 94 L Ed 2d 244 (1987).

In response to *Cabazon*, Congress enacted a comprehensive scheme for the operation and regulation of gaming activities on Indian lands — IGRA, 25 USC §2701 *et seq*. IGRA divides gaming into three classes. Class I gaming encompasses social games for prizes of minimal value. Class II gaming involves bingo and certain card games. Class III gaming covers all other forms of gaming, including casino-style gaming. 25 USC §2703(6), (7) and (8). Only Class III gaming is at issue in this case.

Under IGRA, three conditions must be satisfied before Class III gaming is legal on tribal lands located in Michigan. Two such conditions are relevant here.[2]

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[2]All three conditions are set forth in 25 USC §2710(d)(1):

(continued...)

First, the tribal gaming activities must be "located in a State that permits such gaming for any purpose by any person, organization, or entity[.]" 25 USC §2710(d)(1)(B). Michigan has permitted Class III gaming for nearly seventy years. In 1933, the Legislature authorized betting on horse racing. *See* 1933 PA 199; *Rohan v Detroit Racing Ass'n*, 314 Mich 326; 22 NW2d 433 (1946) (upholding constitutionality of horse racing statute). In 1972, the voters ratified an amendment to the Michigan Constitution removing the prohibition of lotteries. *See* Const 1963, art 4, §41. Wasting no time, the Legislature, in that same year, passed both the Lottery Act, MCL 432.1, *et seq.*, authorizing a State lottery, and the Traxler-McCauley-Law-Bowman Bingo Act ("Bingo Act"), MCL 432.101, *et seq.*, which permits not just bingo, but also casino-style gaming at certain charity events, commonly known as "Las Vegas Nights." In 1996, full-fledged casinos were authorized by the voters when, by initiative, they enacted Proposal E into law. That initiated law was amended by a super-majority vote of the Legislature in 1997, resulting in the enactment of the Michigan Gaming Control and Revenue Act ("MGCRA"), MCL 432.201, *et seq.*[3]

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[2](...continued)

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —
  (A) authorized by an ordinance or resolution that —
    (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
    (ii) meets the requirements of subsection (b) of this section, and
    (iii) is approved by the Chairman,
  (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
  (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

[3]As this brief history shows, the voters themselves have *twice* approved Class III gaming in (continued...)

Second, Class III gaming is lawful on Indian lands only if it is conducted in conformance with a compact between the tribe and the state in which the tribal lands are located.[4] 25 USC §2710(d)(1)(C). In the 1990s, then-Governor Engler negotiated eleven such compacts with Indian tribes located in Michigan. The Governor signed the first seven compacts with various tribes in connection with a consent decree resolving a federal lawsuit filed by the tribes against the Governor. The Legislature approved those compacts by concurrent resolution in September 1993.[5]

In 1997 and 1998, then-Governor Engler negotiated four more compacts with tribes located in Michigan: the Little River Band of Ottawa Indians, the Pokagon Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians and the Nottawaseppi Huron Potawatomi. The resulting four "Tribal-State Compact Agreements" (referred to here as the "Compacts") are the subject of this lawsuit.[6]

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[3](...continued)
the last thirty years — by removing the prohibition of lotteries in 1972 and passing Proposal E in 1996.

[4]IGRA does not specify what is required for a state to validly bind itself to a compact. It has been held that the issue is to be determined by state law. *See Pueblo of Santa Ana v Kelly*, 104 F3d 1546, 1557 (CA 10, 1997). The Court of Appeals misinterpreted IGRA when it suggested that the statute determines this issue.

[5]Provisions of the consent decree were subsequently challenged as violating the Appropriations Clause of the Michigan Constitution. The Ingham County Circuit Court rejected that challenge. Its ruling was subsequently affirmed in *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *lv den* 453 Mich 866 (1996).

[6]The material provisions of the four Compacts are identical. A sample Compact is included in the Appendix at 31b-53b.

B. The Compacts

Under the Compacts, the parties agreed as to the types of Class III games that would be conducted by the Tribes (Compacts, §3; App at 35b-36b),[7] and the Tribes agreed to limit Class III gaming to specified "[e]ligible Indian lands."[8] (Compacts, §2(B)(1); App at 34b.) The Tribes also agreed to certain "regulatory requirements." (Compacts, §4; App at 37b-41b.) However, the Tribes, not the State, assumed "responsibility to administer and enforce the regulatory requirements." (Compacts, §4(M)(1); App at 40b.) Indeed, the Tribes agreed to post a sign in their casinos informing patrons that "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN." (Compacts, §8; App at 44b.)

The State and the Tribes also agreed to an amendment procedure. (Compacts, §16; App at 47b-48b.) Under that provision, the Governor may agree on behalf of the State to an amendment without the approval of the Legislature. However, the State and the Tribes cannot amend the definition of "eligible Indian lands" to include additional counties. (Compacts, §16(A)(iii); App at 47b.) If the parties agree to an amendment, it must be submitted to the Secretary of the Interior for approval. (Compacts, §16(C); App at 48b.) Upon the effective date of the amendment, a certified copy must be filed with the Michigan Secretary of State and transmitted to each house of the Michigan Legislature and the Michigan Attorney General. (Compacts, §16(D); App at 48b.) Until Governor Granholm agreed to amend the Compact between the State and the Little Traverse Bay

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[7]These games are the same as those permitted in the Detroit casinos by the MGCRA, MCL 432.201 *et seq*. *See* 25 USC §2710(d)(1)(B); *compare* MCL 432.202(v) *with* Compacts, §3(a); App at 35b-36b..

[8]The Compacts' definition of "eligible Indian lands" is limited to "trust and reservation lands" and is comparable to IGRA's definition of "Indian lands." *Compare* 25 USC §2703(4) *with* Compacts, §2(B)(1) (App at 34b).

Bands of Odawa Indians ("Little Traverse Amendment") on July 22, 2003, no Compact had been amended.

Pursuant to Section 18 of the Compacts (App at 49b-51b), the Tribes are to make semi-annual payments to local governments affected by the casinos of 2% of the net win from Class III electronic games of chance. These funds are disbursed by Local Revenue Sharing Boards that local governments can choose to create. In addition, the Tribes are to make semi-annual payments to the Michigan Strategic Fund ("MSF") of 8% of the net win at each casino derived from all Class III electronic games of chance. (Compacts, §17; App at 48b-49b.)[9]

Significantly, the Compacts did not become effective unless and until both the Tribes and the State approved them. Section 11 provides in pertinent part:

> This Compact shall be effective immediately upon:
>
> (A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;
>
> (B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature[.] (App at 44b-45b.)[10]

The Legislature approved the Compacts by passing House Concurrent Resolution ("HCR") 115 on December 10 and 11, 1998. The vote was 48 to 47 in the House of Representatives and 21 to 17 in the Senate.

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[9]The payment was in exchange for limited geographic exclusivity and is substantially similar to the payment upheld in *Tiger Stadium Fan Club*, *supra*. The MSF was established by the Michigan Strategic Fund Act, MCL 125.2001, *et seq*. and a substantial percentage of its revenues come from tribal gaming. Its funds are used for a variety of economic development projects.

[10]Approval by the Secretary of the Interior of the United States and publication in the *Federal Register* were also required. (Compacts, §11(C), (D); App at 45b.) There is no dispute that the requirements of §11(A)-(D) were satisfied.

II. PROCEEDINGS

A. Nature of the Case

On June 10, 1999, TOMAC filed this action in the Ingham County Circuit Court seeking a declaration that the Compacts are unconstitutional on the theory that they are legislative in nature. In Count I of its Complaint, TOMAC claimed that the Legislature's approval of the Compacts by concurrent resolution violated Const 1963, art 4, §22 of the Michigan Constitution, requiring that all legislation be by bill. Count II asserted that the State violated the Local Acts Provision, Const 1963, art 4, §26 because the Legislature failed to treat the Compacts as local or special acts. Finally, Count III alleged that the provision in the Compacts permitting the State and the Tribes to amend the Compacts without approval by the Legislature violated the Separation of Powers Clause, Const 1963, art 3, §2.

B. Proceedings in the Circuit Court

The State and TOMAC each filed a motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10), respectively. The State argued that the 1998 Compacts were not legislative in nature and that the Legislature properly approved them by concurrent resolution, just as it had approved the 1993 Compacts. TOMAC argued the contrary position.

The cross motions were heard on December 3, 1999. The Circuit Court issued its Opinion and Order on January 18, 2000 ("Circuit Court Opinion"), a copy of which is included in the App at 1b-16b.

C. The Circuit Court's Ruling

The Circuit Court held that the concurrent resolution approving the Compacts "is legislation" because the Compacts are legislative in nature. (Circuit Court Opinion at 9-12; App 9b-12b.) The principal grounds for the Circuit Court's holding were:

- IGRA does not completely preempt the State's authority to impose its gaming laws on the Tribes, specifically, the MGCRA's minimum age requirement for patrons of casino-style gaming (*Id.* at 10-11; App at 10b-11b.);
- the Compacts authorize the State to regulate the tribal casinos (*Id.* at 11; App at 11b); and
- the Compacts purport to obligate local governments to create Local Revenue Sharing Boards (*Id.* at 11-12; App at 10b-11b).

On that basis, the Circuit Court ruled that the Legislature's action violated Const 1963, art 4, §22, which requires that all legislation be by bill. (*Id.* at 16; App at 16b.) The Circuit Court granted TOMAC's motion for summary disposition, and denied the State's motion for summary disposition, on Count I. (*Id.*) On the same basis, the Circuit Court concluded that the amendment provision of the Compacts "unconstitutionally grants the Executive branch legislative authority in violation of the Michigan Constitution[,]" specifically, the Separation of Powers Clause, Const 1963, art 3, §2. (*Id.* at 13; App at 13b.) Thus, the Circuit Court denied the State's motion for summary disposition on Count III and granted TOMAC's motion on that count. (*Id.* at 16; App at 16b.)

The Circuit Court, however, rejected TOMAC's contention that the Compacts violated the local acts provision of the Michigan Constitution, Const 1963, art 4, §29. (Circuit Court Opinion at 12; App at 12b.) The Circuit Court reasoned that, according to the pertinent constitutional

language, this provision applies only where the Legislature passes a local act where a general act could be made applicable. (*Id.*) Because TOMAC had not argued that a general act could be made applicable, the Circuit Court granted the State's motion for summary disposition on Count II and denied TOMAC's motion for summary disposition on that count. (*Id.*)

D. The Court of Appeals' Decision

On February 4, 2000, the State timely filed in the Court of Appeals separate claims of appeal from the Circuit Court's January 18, 2000 order. TOMAC timely filed a claim of cross-appeal.

The Court of Appeals heard oral argument on August 18, 2002 and, on November 12, 2002, released its opinion ("CA Op"). The Court of Appeals reversed the Circuit Court's rulings on Counts I and III and affirmed the Circuit Court's ruling on Count II. The Court of Appeals found that the Compacts were not legislative in nature because IGRA preempts state regulation of gaming on Indian lands. (CA Op at 11; App at 27b.) Moreover, the Court of Appeals found that Michigan law does not prescribe any method for the approval of Compacts, but that the Legislature had historically approved contracts, and IGRA compacts in particular, by resolution. (CA Op at 13; App at 29b.) Thus, the Court of Appeals concluded that a resolution was a sufficient means of legislative approval. (*Id.*) As a result, the Court of Appeals reversed the Circuit Court's ruling that approval of the Compacts by resolution violated Const 1963, art 4, §22.

The Court of Appeals rejected the Separation of Powers challenge to the amendment provision. The Court held that it was not ripe for review since the Governor had not sought to amend the Compacts. (CA Op at 14; App at 30b.)

Finally, the Court of Appeals affirmed the Circuit Court's ruling that the Compacts did not violate the Local Acts provision of the State Constitution, although on different grounds. The Court

of Appeals concluded that this provision was not implicated by the Compacts since IGRA preempted state regulation of gaming on tribal lands. Consequently, the "citizens of the State of Michigan cannot vote on the propriety of placing tribal casinos on tribal lands." (CA Op at 14; App at 30b.)

TOMAC applied for leave to appeal the Court of Appeals' ruling to this Court on December 3, 2002. This Court granted leave on September 25, 2003. In its order granting leave, this Court directed the parties to "include among the issues briefed whether approval of the state-tribal compacts by concurrent resolution is effective in light of Const 1963, art 4, §22."

III. STANDARD OF REVIEW, PRESUMPTION OF CONSTITUTIONALITY AND BURDEN OF PROOF

The State agrees with TOMAC's statement that the Circuit Court's rulings on the parties' cross-motions for summary disposition are subject to a de novo standard of review. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) (an appellate court "reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."). The State, however, disagrees with TOMAC's position that this Court need not presume that the Legislature's act of approving the Compacts by concurrent resolution was constitutional. The concurrent resolution is entitled to a presumption of constitutionality because it was a "deliberate act" of the Legislature. *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934) ("[A]ll presumptions are in favor of the constitutionality of the deliberate acts of a coordinate department of government."). Finally, the burden of proving that the Legislature violated the Constitution rests on TOMAC. "The burden of proving an alleged constitutional violation rests on the party asserting it." *Morris v Metriyakool*, 107 Mich App 110, 116-117; 309 NW2d 910 (1981), *aff'd* 418 Mich 423; 344 NW2d 736 (1984). This is a heavy burden to sustain. "Such an allegation

must be sustained not as a matter of speculation but as a demonstrable reality." *Id.* at 117.

IV. APPROVAL OF THE COMPACTS BY CONCURRENT RESOLUTION DID NOT VIOLATE CONST 1963, ART 4, §22

A. Summary of Argument

The Court of Appeals correctly found that the Legislature's approval of the Compacts by concurrent resolution did not violate Const 1963, art 4, §22 because the Compacts are not "legislation". The Compacts are not "legislation" because:

- Unilateral regulation is the defining feature of "legislation"; yet Congress has prohibited states, like Michigan, which permit Class III gaming from unilaterally regulating such gaming on tribal lands without the consent of the tribes.
- The Compacts do not confer any power on the State to regulate the Tribes' casino operations; regulation is left exclusively to the Tribes.
- The Compacts do not create any agencies or public bodies.

Thus, this Court should affirm the Court of Appeals' ruling that the Michigan Constitution did not require the Legislature to approve the Compacts by bill.

B. Unilateral Regulation Is The Defining Feature Of Legislation

Const 1963, art 4, §22 provides that "[a]ll legislation shall be by bill and may originate in either house." TOMAC contends incorrectly that the Legislature violated this provision when it approved the Compacts by resolution rather than by bill. TOMAC is wrong because the Compacts are not "legislation".

In *Westervelt v National Resources Comm*, 402 Mich 412, 440; 263 NW2d 564 (1978), a plurality of this Court said that "the concept of 'legislation', in its essential sense, is the power to speak on any subject *without any specified limitations*." (Emphasis in original.) This unrestricted

power to "speak" is "the authority to make, alter, amend and repeal laws." *Harsha v City of Detroit*, 261 Mich 586, 590; 246 NW 49 (1933). *Accord, In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940) quoting *In re Application Consolidated Freight Co*, 265 Mich 340, 343; 251 NW 431 (1933) ("To enact laws is an exercise of legislative power[.]"), Cooley, *Constitutional Limitations* (5th ed) p 109 ("The legislative power we understood to be the authority, under the constitution, to make laws, and to alter and repeal them.") "Law" means "the rules of action or conduct duly prescribed by controlling authority, and having binding legal force[.]" *United States Fidelity & Guaranty Co v Guenther*, 281 US 34, 37; 50 S Ct 165; 74 L Ed 683 (1930). *Accord*, Cooley, *supra* at 109 ("Laws . . . are rules of civil conduct or statutes, which the legislative will has prescribed."). Thus, the legislative power "prescribes rules of action," *In re Manufacturer's Freight Forwarding Co*, *supra* at 63, quoting *In re Application of Consolidated Freight Co.*, 265 Mich 340, 343; 251 NW 431 (1940), which are "to be applied thereafter to all or some part of those subject to its power." *Id.*, quoting *Prentis v Atlantic Coast Line Co*, 211 US 210; 29 S Ct 67; 53 L Ed 150 (1908) (emphasis supplied). Simply put, the "power to legislate" is one "controlling action." *Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146, 155; 166 NW 998 (1918).

Whether the Compacts are legislation cannot be determined without fully understanding their unique role in the federal law that created them. That law, IGRA, bars states from unilaterally regulating tribal gaming. Instead, it permits the states to shape the terms under which tribal gaming is conducted only by negotiating them in a compact with a tribe. Thus, under IGRA, and principles of federalism applicable to Indian matters, Michigan does not have unilateral power over tribal gaming.

C. IGRA Preempts Unilateral State Regulation Of Gaming On Indian Lands

Before Congress enacted IGRA, the United States Supreme Court had held in *California v Cabazon Band, supra*, 480 US at 216, that federal law preempted the states from regulating tribal gaming operations. In that case, the State of California and a California county sought to extend their laws regulating bingo to tribal bingo games. The Court recognized that, as a general principle of federal Indian law, "[state] jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.*, quoting *New Mexico v Mescalero Apache Tribe*, 462 US 324, 333-34; 103 S Ct 2378; 76 L Ed 2d 611 (1983). The Court found that the federal government had a strong policy favoring tribal bingo enterprises and that the tribes had a strong interest in conducting such games as a means of generating revenue. The state's only interest in extending its bingo laws to the tribes was to prevent the infiltration of organized crime. The Court found that interest to be insufficient to avoid preemption.

> To the extent that the State seeks to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant and the state and county laws are pre-empted. Even to the extent that the State and county seek to regulate short of prohibition, the laws are pre-empted.

480 US at 220-21. Thus, under *Cabazon*, if a state allowed gaming, tribes had the right to conduct gaming on their lands and state regulations would not apply.

In the wake of *Cabazon*, Congress passed IGRA, which "created a framework for the regulation and management of gambling on Indian land[.]" *Keweenaw Bay Indian Community v United States*, 136 F3d 469, 472 (CA 6, 1998). IGRA sets up a comprehensive federal regulatory scheme for tribal gaming, including the establishment of the National Indian Gaming Commission,

which has the power to, among other things, promulgate regulations and guidelines, and close tribal gaming operations for regulatory violations. *See* 25 USC §2704(a), §2706(b)(10), §2713(b). The cornerstone of IGRA's regulation of Class III gaming is the tribal-state compact. Without it, Class III gaming on Indian lands is unlawful. "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State[.]" 25 USC §2710(d)(1)(C).[11]

In *Gaming Corp of America v Dorsey & Whitney*, 88 F3d 536 (CA 8, 1996), the court held that IGRA completely preempts state laws regulating gaming on Indian lands. The court's preemption analysis revealed that the *states have no power to unilaterally regulate gaming on Indian lands* because a state may apply its laws to tribal gaming only if the tribes consent in a compact. Congress "left states with no regulatory role over gaming except as expressly authorized by IGRA[.]" *Id.* at 546. IGRA, however, does not transfer any regulatory power over Class III gaming to the states. "If a state law seeks to regulate gaming, it will not be applied." *Id.* at 547. States acquire regulatory power only if the tribes consent in a compact to a transfer of such power.

> The legislative history indicates that *Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact.*
>
> Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, *unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.* The mechanism for facilitating the unusual relationship in which a tribe might

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[11]Some courts have held that, where a state raises the Eleventh Amendment defense to a federal suit by a tribe to compel the state to negotiate a compact, the tribe may request the Secretary of the Interior to promulgate regulations governing gaming on the tribe's lands. *See*, *infra*, pp. 20-21.

> affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S.555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose.

Id. at 545, quoting S Rep No 446, 100th Cong, 2d Sess 5 (1988) *reprinted in* 1988 USCCAN 3071, 3075 (emphasis supplied). Thus, "Congress left the states without a significant role under IGRA unless one is negotiated through a compact." *Id.* at 547. As the court put it, "the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Id.* at 546.[12]

The Michigan Legislature expressly recognized IGRA's limitation on state regulatory authority when it enacted the MGCRA, which authorized the operation of three casinos in Detroit. The MGCRA provides that "*[i]f* a federal court or agency rules or *federal legislation is enacted that allows a state to regulate gambling on Native American land* or land held in trust by the United States for a federally recognized Indian tribe, the *legislature shall enact legislation* creating a new act consistent with this act *to regulate casinos that are operated on Native American land* or land held in trust by the United States for a federally recognized Indian tribe." MCL 432.203(5) (emphasis supplied). Because no such authority for unilateral state regulation exists, the MGCRA further provides that its regulatory requirements do not apply to "[g]ambling on Native American

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[12]*See also Pueblo of Santa Ana, supra*, 104 F3d at 1554, quoting Senate Report No 100-446 as follows:

> The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting [sic] various matters between two equal sovereigns.

land and land held in trust by the United States for a federally recognized Indian tribe on which gaming may be conducted under [IGRA]." MCL 432.203(2)(d).[13]

IGRA also forbids a state from forcing a tribe to accept the particular regulations that a state imposes on gaming that is within its jurisdiction. Instead, those regulations are subject to compact negotiations.

In *Mashantucket Pequot Tribe v State of Connecticut*, 913 F2d 1024 (CA 2, 1990), the court held that a tribe was not required to conform its gaming activities to Connecticut's gaming regulations. Like Michigan, Connecticut permitted certain non-profit organizations to operate casino-style gaming events, typically referred to as "Las Vegas nights." These events were subject to strict regulations, including a minimum age requirement. *See Mashantucket Pequot Tribe v State of Connecticut*, 737 F Supp 169, 175 (D Conn, 1990) *aff'd* 913 F2d 1024 (CA 2, 1990) ("No persons under 18 may conduct, operate, or play such games[.]"). Connecticut argued that "where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming." 913 F2d at 1030-1031. The court soundly rejected this argument.

> [If the state's position were correct, the] *compact process* that Congress established as the centerpiece of the IGRA's regulation of class III gaming *would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible*. Congress intended, on the contrary, that:
>
> *Even if a tribe engages in class III gaming pursuant to a compact with the State, it*

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[13]Because it amended an initiated law, the MGCRA had to be passed by a super majority vote of the Legislature. *See* Const 1963, art 2, §9. Former Representative Baird voted in favor of this legislation, which passed the House by a 93 to 12 vote. *See* House Journal No. 62 at 1529-1530 (7/1/97) (App at 92b-94b).

> *does not necessarily follow that the tribe is subject to the entire body of State law on gaming*. The tribe and the State may negotiate terms such as "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity. 25 U.S.C.A. §2710(d)(3)(C)(i).

Id. at 1031, quoting *United States v Sisseton-Wahpeton Sioux Tribe*, 897 F2d 358, 366 n10 (CA 8, 1990) (emphasis supplied).

A similar conclusion was reached in *Willis v Fordice*, 850 F Supp 523, 532 (SD Miss, 1994), in which a member of the Choctaw Indian tribe challenged a tribal-state compact permitting casino gaming. Mississippi law allowed such gaming only on the Mississippi River or the Gulf Coast. The court rejected the plaintiff's argument that the tribe, whose lands were located elsewhere, was required to comply with that restriction.

> In this case, the Choctaw Indian tribe in the State of Mississippi is not bound by the requirement that gaming be located on navigable waters, as Willis asserts. *Because Mississippi allows such gaming as a matter of public policy, it may not prohibit Class III gaming by the Choctaw Indian tribe on tribal lands. The tribe is only bound by the provisions contained in the Compact between the tribe and the State, not all of the regulations contained in the Mississippi Gaming Control Act.*

Id. at 532 (emphasis supplied).

As these cases illustrate, IGRA quite clearly provides that states, like Michigan, which allow Class III gaming *may not* require a tribe to accept the state's gaming regulations; rather, they are subjects of *negotiation* between the state and the tribe.

Despite this mountain of authority, TOMAC argues that IGRA does not preempt state gaming law. Each of TOMAC's arguments fails.

First, TOMAC argues that, in the absence of a compact, 18 USC §1166 "expressly made State gambling laws apply to Indian country." (TOMAC's Brief at 34.) But §1166 does not extend

state jurisdiction over tribal gaming. It merely "incorporates state laws as the *federal law* governing all non-conforming gambling in Indian country." *United Keetoowah Band of Cherokee Indians v Oklahoma*, 927 F2d 1170, 1177 (CA 10, 1991) (emphasis supplied). A state has no jurisdiction to enforce these laws. The "power to enforce these newly incorporated laws rests solely with the United States[.]" *Id. See also, Strader v Verant*, 964 P2d 82, 87 (NM, 1998) ("federal government has exclusive jurisdiction over gaming-related violations of law that take place on Indian reservations."). Indeed, absent a tribal agreement permitting state jurisdiction, a state is "without jurisdiction" to "prosecute any state gambling law violations applicable in Indian country." *AT&T Corp v Coeur D'Alene Tribe*, 295 F3d 899, 909 (CA 9, 2002).

Second, TOMAC argues that 25 USC §2710(d)(3)(c) "gives a State the right to ensure that its policies will continue to apply" if the state enters into a gaming compact with a tribe. (TOMAC's Brief at 35.) This is incorrect. The cited provision of IGRA only sets forth the subjects that may be addressed in a compact, including the extension of the state's civil and criminal jurisdiction over Indian gaming. It does not give a state the "right" to so extend its civil and criminal jurisdiction; a state may do so only if a tribe agrees to such an extension. "IGRA limits the state's regulatory authority to that expressly *agreed upon* in a compact." *Cabazon Band of Mission Indians* v *Wilson*, 124 F3d 1050, 1059 (CA 9, 1997) (emphasis supplied). *Accord, United Keetoowah Band of Cherokee Indians*, 927 F2d at 1177 ("[T]he very structure of the IGRA permits assertion of state civil or criminal jurisdiction over Indian gaming *only* when a tribal-state compact has been reached to regulate class III gaming. The statute appears to leave no other direct role for such State gaming

enforcement.") (Emphasis in original; footnote and citation omitted.)[14]

Finally, TOMAC argues that *Seminole Tribe of Florida v Florida*, 517 US 44; 116 SCt 1114; 134 LEd 2d 252 (1996), implies that "a state need not negotiate any compact at all" in order to "control the spread of Indian casino gaming within their borders." (TOMAC's Brief at 36.) This is wrong. *Seminole* held only that under the Eleventh Amendment to the federal Constitution, a tribe may not sue an unconsenting state in federal court to compel the state to negotiate a compact. But that does not mean that a state has no duty to negotiate nor that a tribe is without remedy if the state refuses to do so. In *Seminole Tribe of Florida v Florida*, 11 F3d 1016 (CA 11, 1994), *aff'd* 517 US 44; 116 SCt 1114; 134 LEd2d 252 (1996), the court observed that a tribe faced with an Eleventh Amendment defense may notify the Secretary of the Interior who may then prescribe regulations for gaming on the tribe's lands.

> If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. §2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. *Id.* at 1029.

Accord, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v Engler*, 304 F3d 616, 617 (CA 6, 2002) ("If a state asserts Eleventh Amendment immunity in the tribe's suit to compel

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[14]TOMAC concedes that a state's ability to extend its civil and criminal jurisdiction "is not unilateral nor without limitation." (TOMAC's Brief at 35.) But then in a footnote, TOMAC suggests that this limitation is no different from the normal restrictions placed on "legislation" such as the federal and state constitutions and federal law. (TOMAC's Brief at 35, n 19.) This is wrong. IGRA's limitation is that a tribe must consent before state jurisdiction may be extended over Indian gaming. Legislation could never be restricted in this way; the Legislature never has to obtain permission from those who are to be subjected to its legislative power. *Boerth v Detroit City Gas Co*, 152 Mich 654, 659; 116 NW 628 (1908) ("The exercise of the legislative power requires the consent of no person except those who legislate.") quoting *Indianapolis v Indianapolis Gaslight and Coke Co*, 66 Ind 396, 403 (1879).

negotiation, the tribe may go directly to the Secretary of the Interior[.]") This remedy "mitigate[s] any imbalance resulting from a tribe's inability to bring suit against the State." *New York v Oneida Indian Nation of New York*, 78 FSupp 2d 49, 57 (NDNY, 1999). Thus, "it may be that [a state's] consent to be sued is no concession at all." *Tiger Stadium*, 217 Mich App at 450 n2.[15]

* * *

In sum, IGRA does not permit states to legislate in the area of gaming in Indian country. Rather, it only permits the states to negotiate the terms of such gaming in a compact with a tribe. Thus, Congress gave the states *bargaining, not regulatory*, power over tribal gaming.

D. The Compacts Are Not Legislation Because They Are Contracts That Do Not Grant The State Any Regulatory Power And Do Not Create Any Agencies Or Other Public Bodies

An IGRA compact is a contract between a state and a tribe that Congress expressly created as an alternative to state legislation. Michigan law has also recognized that a contract with a governmental unit is distinct from legislation. Legislation is the act through which the Legislature unilaterally imposes obligations upon or regulates the conduct of others. By contrast, a contract is a product of agreement; it has no legal effect unless *the other party* consents to it. Thus, contracts with the State, like the Compacts involved here, are not legislation. Furthermore, the specific terms of the Compacts do not alter this result. The Tribes did not consent to the extension of regulatory authority, nor did the parties agree to create any agencies or other public bodies.

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[15]Another remedy was recognized by the court in *Chemehuevi Indian Tribe v Wilson*, 987 FSupp 804 (ND Calif, 1997). Finding that the Eleventh Amendment "does not bar a suit brought by the United States against the State on [the tribes'] behalf", *id.* at 806, the court held that "[a] duty on behalf of the United States to sue the State to bring it to the bargaining table can certainly be implied from IGRA, since it appears that this is the only legal remedy available to the plaintiff tribes to seek the benefits Congress intended them to have and to preserve the balance Congress carefully struck between the interests of the states and the tribes," *id.* at 808.

1. The Compacts Are Contracts

As the Court of Appeals held, Compacts are *contracts*. (CA Op at 4; App at 20b.) The United States Supreme Court held, with reference to an interstate compact, that "[a] Compact is, after all, a contract." *Texas v New Mexico*, 482 US 124; 107 S Ct 2279; 96 L Ed 2d 105, 114 (1987), quoting *Petty v Tennessee-Missouri Bridge Comm'n*, 359 US 275, 285; 79 S Ct 785; 3 L Ed 2d 804 (1959) (Frankfurter, J., dissenting). This characterization applies equally to tribal-state gaming Compacts. In *Pueblo of Santa Ana v Kelly*, *supra*, 104 F3d at 1556, the court expressly recognized, with reference to a gaming compact between the State of New Mexico and a tribe, that "[a] compact is a form of contract." Recently, the New Mexico Supreme Court recognized that a 1997 IGRA compact "is a contract between the State of New Mexico and Tesuque" that the state legislature chose to codify in a statute. *Gallegos v Pueblo of Tesuque*, 46 P3d 668, 679; 132 NM 207 (2002). Similarly, the Compacts involved in this case are *contracts* between the State and the Tribes.

TOMAC's effort to minimize the fundamentally contractual nature of a tribal-state gaming compact fails. TOMAC cites cases that observe that compacts are both statutory and contractual in nature. (TOMAC's Brief at 10.) These decisions have no bearing on the issue in this case. They involve *inter*-state compacts, not *tribal*-state *gaming* compacts.[16] Interstate compacts are authorized by the federal Compact Clause, US Const, Art I, §10, cl 3; whereas a tribal-state gaming compact is authorized by IGRA. Even TOMAC admits that the "federal Compact Clause is . . . inapplicable" to this case. (TOMAC's Brief at 38.) Indeed, there is a critical difference between a typical interstate compact and the IGRA Compacts involved here. The former generally impose duties on

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[16]The few cases cited by TOMAC that do involve tribal-state gaming compacts are clearly distinguishable from this case in several important ways. *See*, *infra* pp 29-31.

the state.[17] The Compacts, however, impose no duties on the State of Michigan.

TOMAC also claims that states "may" enter into interstate compacts by either enacting the compact's terms by statute or passing an enabling act authorizing a state agency to enter into a compact. (TOMAC's Brief at 11.) But the cases cited by TOMAC do not hold that these are the *only* ways a state may enter into an interstate compact, let alone a tribal-state gaming compact. In fact, *Sullivan v Commonwealth*, 550 Pa 639; 708 A2d 481 (1998), held that how the state is to enter into a compact is dictated by the terms of the compact. In that case, the court considered whether Pennsylvania could enter into the Drivers License Compact of 1961 by authorizing the Pennsylvania Secretary of State to do so or whether a statute adopting the compact was required. Initially, the court noted that the "Compact is a contract between states." *Id.*, 550 Pa at 645, 708 A2d at 484. The court concluded that passage of a statute adopting the compact was required simply because the compact so provided: the court was not "empowered to give terms of the *contract* a meaning *inconsistent with the drafters' clear intent.*" 550 Pa at 646, 708 A2d at 646 (emphasis supplied).

The Compacts at issue here, just like those approved in 1993, expressly provide that they shall become effective, not upon passage of a statute, but upon (among other things) "[e]ndorsement by the Governor of the State and concurrence in that endorsement by *resolution of the Michigan Legislature*." (Compacts, §11(B); App at 45b (emphasis supplied).) Thus, under TOMAC's own case law, the Legislature had to approve the Compacts by resolution or risk being "inconsistent with

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[17] *See*, *State v Svenson*, 104 Wash 2d 533, 541; 707 P2d 120, 122 (1985) (Columbia River Compact "restricts the right of either state [Washington and Oregon] to expand fishing beyond that permitted in 1918."); *Aveline v Pennsylvania Board of Probation and Parole*, 729 A2d 1254 (Commonwealth Court, Pa., 1998) (Interstate Compact for the Supervision of Parolees and Probationers involved in case requires state receiving parolee or probationer from other state to supervise parolee or probationer; *see* 61PS §321(2)).

the drafters' clear intent."

2. Contracts Are Not "Legislation"

A contract with a public body, like the State, is fundamentally different from legislation. As shown above, when the Legislature makes law, it imposes rules *unilaterally*. By contrast, a contract has no force unless both parties consent to it. "A basic requirement of contract formation is that the parties *mutually* assent to be bound." *Rood v General Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993) (emphasis supplied). Consequently, "[t]he power to regulate as a governmental function, and the power to contract for the same end, *are quite different things*. One requires the consent *only of the one body*, the other *the consent of two*." *Detroit v Michigan Public Utilities Commission*, 288 Mich 267, 288; 286 NW 368 (1939), quoting *Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146, 159-160; 166 NW 998 (1918) (emphasis supplied). *Accord, Boerth v Detroit City Gas Co*, 152 Mich 654, 659; 116 NW 628 (1908) ("The exercise of the legislative power requires the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another, or others."), *Board of Supervisors v Hubinger*, 137 Mich 72, 77; 100 NW 261 (1904) (existence of municipalities is not based on "anything like a contract between them and the legislature of the State, because there is not, and cannot be, any reciprocity of stipulation[.]") quoting *Laramie County Commissioners v Albany County Commissioners*, 92 US 307, 311; 23 L Ed 552; 2 Otto 307 (1876).[18]

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[18]Other decisions of this Court also distinguish between a contract and legislation. *See Gale v Board of Supervisors*, 260 Mich 399, 404; 245 NW 363 (1932) ("[l]egislative acts, as distinguished from contracts, do not tie the hands of succeeding legislatures."); *Schurtz v Grand Rapids*, 205 Mich 102, 106; 171 NW 463 (1919) ("The fixing of the salaries by the governing body of the municipal corporation is a legislative act and an ordinance enacted for that purpose is not in the nature of a contract between the municipal corporation and the employees.")

The Compacts explicitly provide that they do not take effect unless the State *and* the Tribes endorse them. (Compacts, §§11(A) and (B); App at 45b.) Both the terms of the Compacts and the framework of IGRA, which prohibits unilateral state regulation of tribal gaming, require the "consent of two" parties before the Compacts became effective. Legislation, however, is dependent upon the approval of only *one* party–the government. Thus, the Compacts are not legislation. "Tribal-state gaming compacts are agreements, *not legislation*, and are interpreted as contracts." *Confederated Tribes of the Chehalis Reservation v Johnson*, 135 Wn2d 734, 750; 958 P2d 260, 267 (1998) (emphasis supplied).

The specific terms of the Compacts do not change this result. In particular, the Tribes did not agree to permit the State to regulate the tribal casinos — that responsibility is left exclusively to the Tribes. Nor did the State and the Tribes agree to create any agency or other public body. In that regard, TOMAC's contention that the Compacts create Local Revenue Sharing Boards is wrong. The creation of those boards is at the option of the local governments; they need only create the boards if they wish to receive the tribal payment. These points are explained below in detail.

3. The Compacts Do Not Confer Any Regulatory Power On The State

Congress left it up to the states and the tribes to decide, through a compact, whether the state would be allowed to exercise any regulatory control over the tribal casinos. Some compacts involving other states provide for such extensive state regulation.[19] In the Compacts involved here,

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[19]*See, e.g., Kansas v Finney*, 251 Kan 559; 836 P2d 1169 (1992) (compact established a state gaming agency with the authority to regulate the tribe's compliance with the compact); *Saratoga County Chamber of Commerce v Pataki*, 2003 NY LEXIS 1470; 798 NE2d 1047 (2003) (oversight of tribal gaming operations vested in an existing state agency). *Finney* and *Pataki* are discussed in more detail below. *See*, *infra*, pp. 29-31.

however, the Tribes do not give the State any regulatory authority.[20] In Section 4 of the Compacts, the Tribes agreed to certain regulatory requirements for Class III gaming. *But the Tribes, not the State, assumed the responsibility for administering and enforcing these requirements.* "The Tribe shall have responsibility to administer and enforce the regulatory requirements." (Compacts, §4(M)(1); App at 40b.) In fact, in Section 8 of the Compacts, (App at 43b-44b), the Tribes agreed to post in their casinos a sign notifying patrons that:

THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN

If the State believes that the Tribe is not properly administering and enforcing the regulatory requirements, the State may not unilaterally force the Tribe to comply. Instead, the State may invoke the dispute resolution procedure described in Section 7 of the Compacts (App at 42b-43b), which resembles a typical commercial contract provision. Under that procedure, the State notifies the Tribe of the alleged violations, and if the parties cannot agree, the dispute is sent to arbitration. Thus, as the Court of Appeals correctly concluded, "there is no enforcement provision within [the] compacts to ensure that the compact terms are satisfied . . . . [T]he inability to enforce those terms precludes a challenge to the constitutionality of the compact. " (CA Op at 13; App at 29b.)

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[20]At most, the Tribes agreed to merely "adopt" one State law as "tribal" law (Compacts, §10; App at 42b) and to act "as if" another State law applied to the tribal casinos. (Compacts, §5; App at 44b.) This does not subject the Tribes to State law. *RJ Williams Co v Fort Belknap Housing Auth*, 719 F2d 979, 982 (CA 9, 1983) (by adopting state's law, tribe had "not relinquished its own sovereignty [nor] involved the state in any way in the enforcement or interpretation of tribal law.").

4. The Compacts Do Not Create Any Agencies Or Public Bodies

TOMAC argues that Section 18 of the Compacts obligates local units of government to create Local Revenue Sharing Boards. (TOMAC's Brief at 28-29.) TOMAC, however, misconstrues the contract language. Because the Compacts are contracts between the State and Tribes, local governments are third parties that cannot be bound by the Compacts' terms. Thus, the State, through its Compacts with the Tribes, did not impose a duty on local governments. Rather, the State and Tribes simply *conferred a benefit* on local governments and made the creation of the boards a condition precedent to the receipt of those benefits.

Section 18 of the Compacts provides certain financial benefits to the communities affected by the tribal casino. There, the Tribes agreed to make semi-annual payments of 2% of their net win from Class III electronic games of chance to the treasurer of the county in which the tribal casino is located who receives the payment on behalf of the Local Revenue Sharing Board. The purpose of this payment is to "provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the Class III gaming facility." (Compacts, §18(A)(ii); App at 49b-50b.) The Compacts go on to say that "[t]o this end, a Local Revenue Sharing Board shall be created by those local governments in the vicinity of the Class III gaming facility to receive and disburse the semi-annual payments from the tribe" as further described in Section 18. (Compacts, §18(A)(ii); App at 50b.) TOMAC is wrong that this language obligates local governments to create the boards.

Because the Compacts are contracts, they are interpreted according to contract rules of construction. *Confederated Tribes of the Chehalis Reservation, supra*, 958 P2d at 267. These "rules of construction require that all clauses of the contract be given an effective and reasonable

meaning[.]" *Detroit v AW Kutsche & Co*, 309 Mich 700, 709; 16 NW2d 128 (1944). TOMAC's interpretation of Section 18 does not satisfy this test. It postulates that the State and the Tribes somehow tried to impose an obligation on someone who is not a party to their contract, *i.e.*, local governments. But common sense, as well as the law, teaches that only a *party* to a contract is *bound*

to receiving the promised benefits.[21] They must do so only "to receive and disburse the semi-annual payments[.]" (Compacts, §18(A)(ii); App at 50b.) Failure to fulfill this contractual condition could deny them, at most, the opportunity to share in the fruits of the contract. But it would not result in a "breach" of the Compacts since, as third party *beneficiaries*, these local governments are under no *obligation* to create the boards required to receive those benefits. Thus, the Compacts do not purport to create the Local Revenue Sharing Boards.

E. *Finney, Johnson* and *Pataki* Are Distinguishable

TOMAC relies on *Kansas v Finney*, 251 Kan 559; 836 P2d 1169 (1992), *New Mexico v Johnson*, 120 NM 562; 904 P2d 11 (1995), and *Saratoga County Chamber of Commerce, Inc v Pataki*, 2003 NY LEXIS 1470; 798 NE2d 1047 (2003), arguing that they show that the Compacts involved in this case are legislation. TOMAC's reliance is misplaced. All three are distinguishable because, among other reasons, the compacts in those cases were never presented to the state legislatures for approval. Therefore, those cases cannot guide the analysis of the issue presented here.

In *Finney*, the governor negotiated a gaming compact with the Kickapoo Nation. The Kansas compact was not presented to the Kansas legislature for approval by either legislation or resolution. Instead, the governor alone purported to enter into it on behalf of the state. Unlike the Michigan Compacts, which impose no obligations on the State, the Kansas compact created a state gaming agency that was responsible for monitoring the tribe's compliance with the compact. The court

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[21]Local units of governments already have statutory authority to create a Local Revenue Sharing Board. *See*, Urban Cooperation Act, MCL 124.501. That statute authorizes local units of government to enter into agreements providing for "the precise organization, composition, and nature of any separate legal or administrative entity created in the interlocal agreement with the powers designated to that entity." MCL 124.505(c).

found that, under Kansas law, "[t]he creation of a state agency is clearly a legislative function[.]" 251 Kan at 582. Thus, the court held that "*in the absence of* an appropriate delegation of power by the Kansas Legislature or *legislative approval of the compact*, the governor has no power to bind the State to the terms thereof." 251 Kan at 583 (emphasis supplied). Here, the Legislature did approve the Compacts, which neither created a new State agency nor imposed any duties on existing agencies.

In *Johnson*, the governor of the State of New Mexico entered into a gaming compact with an Indian tribe. The New Mexico compacts, unlike those involved here, authorized more forms of gaming than New Mexico otherwise permitted. 120 NM at 573. As in *Finney*, the compact was not presented to the state legislature for its approval in any fashion. The issue before the court was whether the governor had attempted to exercise legislative authority contrary to the separation of powers doctrine. Under New Mexico law, the test for a violation was "whether the Governor's action disrupts the proper balance between the executive and legislative branches." 120 NM at 574. The governor's action disrupted this balance, the court held, because the governor had entered into the compact "*in the absence of any action on the part of the legislature* . . . . While the legislature might authorize the governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority." 120 NM at 574 (emphasis supplied). Again, in this case, the Legislature ratified then-Governor Engler's decision to execute the Compacts.

In *Pataki*, the governor negotiated and entered into a gaming compact with a tribe. Unlike here, oversight of gaming operations was vested in a state agency and specifically enumerated enforcement duties were assigned to the state police. 2003 NY LEXIS at *5. As in *Finney* and

Johnson, the compact had not been approved by the state's legislature. The court held that the governor alone had made policy decisions that were reserved for the legislature and, therefore, violated New York's separation of powers doctrine. The court concluded that "the State Executive lacks the power *unilaterally* to negotiate and execute tribal gaming compacts under IGRA." 2003 NY LEXIS at *36 (emphasis supplied). Here, of course, then-Governor Engler did not "unilaterally" execute the Compacts; rather, he did so with the approval of Michigan's Legislature by a concurrent resolution.

Moreover, *Pataki*, like *Finney* and *Johnson*, is completely silent on whether the legislature had to approve the compacts at issue in the form of legislation, resolution or by some other means. The *Pataki* court speaks of the need for the legislature's "approval or total ratification", 2003 NY LEXIS at *36, but does not state how that approval or ratification must be expressed under the state's constitution. In *Pataki*, *Finney* and *Johnson*, unlike here, the court had no need to reach that issue since the legislature had no involvement whatsoever in the compacting process.

F. The Legislature Acted Within Its Discretion By Approving The Compacts By Concurrent Resolution

The Michigan Constitution did not prohibit the Legislature from approving the Compacts by concurrent resolution. "The Constitution of the State of Michigan is not a grant of power to the legislature, but is a limitation upon its powers." *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939). As a result, "the Legislature can do anything which it is not prohibited from doing by the people through the federal and state constitutions." *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936). Article 4, §22 of the Constitution limits the Legislature's power to enact legislation by requiring the use of the bill procedure. Since the bill

procedure applies only to legislation, and the Compacts are contractual and not legislative in nature, Const, art 4, §22 did not require the Legislature to approve the Compacts by bill.

When the Legislature approved the Compacts, it was exercising its *contracting* power. The Legislature has the general power to contract unless the Constitution imposes limitations. *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311; 254 NW2d 544 (1977). There are no constitutional or statutory limits on the Legislature's power to bind the State to a contract with a Tribe. As the Court of Appeals concluded, "Michigan has not delineated standards for passage of compacts or contracts." (CA Op at 7; App at 23b.) Thus, the Legislature had discretion to approve the Compacts by concurrent resolution since nothing *prohibited* it from doing so. *See, Case v Saginaw*, 291 Mich 130, 150; 288 NW 357 (1939) (where not prohibited by statute or charter provision, city could approve contract by resolution).

The Michigan Legislature often acts by concurrent resolution in significant areas where the Constitution is silent on the procedure to be followed. Several constitutional provisions require the Legislature to take an action but do not specify how that is to be done. *See, e.g.*, Const 1963, art 4, §53 (appointment of Auditor General); Const 1963, art 11, §5 (approval of certain civil service pay increases); and Const 1963, art 4, §17 (establishing special legislative committees); Const 1963, art 10, §5 (designation of land as part of state land reserve). In these situations, the Legislature historically has chosen to act by concurrent resolution. (Illustrative resolutions appear in the Appendix at 95b-104b.)

Resolutions have also been used by the Michigan Legislature to ratify amendments to the

federal Constitution. As the Tribes point out in their proposed brief *amici curiae*,[22] this Court has recognized that, by using a resolution for that purpose, the Legislature has not engaged in a "legislative act" that "enacted a law". *Decher v Vaughan*, 209 Mich 565, 571; 177 NW 388 (1920). Rather, the "State . . . [is] expressing its assent" to the proposed amendment. *Id.* Similarly, the State expressed its "assent" to the Compacts through HCR 115.

Indeed, the State assented to the original seven IGRA compacts by resolution of the Legislature. The Court of Appeals has indicated that such approval of the seven original compacts by resolution did not usurp the power of the Legislature to make law. In *Tiger Stadium Fan Club*, *supra*, the court rejected the contention that the payment of tribal revenues to the Michigan Strategic Fund violated the Appropriations Clause of the Michigan Constitution. The court then went on to say that "having in mind that the Legislature ratified and approved the Governor's actions and the resulting compacts and consent judgment, we reject the argument that the Governor usurped the powers of the Legislature." *Id.*, 217 Mich App at 456 n 5. In *McCartney v Attorney General*, 231 Mich App 722, 728, 729; 587 NW2d 824 (1998), the court found that *Tiger Stadium* "acknowledged that the Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature. . . He did not enact legislation or force legislation on the Legislature."[23]

In holding that a resolution was a sufficient means of approval, the Court of Appeals in this case relied on certain decisions under the federal Compact Clause, US Const, Art I, §10, cl 3,

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[22]*See* proposed Brief on Appeal – *Amici Curiae* Little River Band of Ottawa Indians, Little Traverse Bay Band of Odawa Indians, Nottawaseppi Huron Band of Potawatomi Indians, and Pokagon Band of Pottawatomi Indians.

[23]*Tiger Stadium* and *McCartney* are particularly persuasive since this Court denied leave to appeal in both cases. *See Tiger Stadium*, 453 Mich 866 (1996) and *McCartney*, 460 Mich 873 (1999).

particularly *United States Steel Corp v Multistate Tax Commission*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978). The Court of Appeals drew from *US Steel* a principle that is directly applicable to this case. As that court explained, "The significance of this decision to the case pending before this Court is two-fold. The consent or approval of compacts is the result of historic practice based on caution or convenience, and the procedure for approval, whether by resolution or legislation, has not been mandated by law." (CA Op at 6; App at 22b.) Such a principle dispatches with TOMAC's argument that the IGRA compacts had to be approved by legislation because all interstate compacts utilized that form of approval. A state's "historical practice, which may simply reflect considerations of caution and convenience . . . is not controlling." *US Steel*, *supra*, 434 US at 471.

In sum, the Legislature had the discretion to approve the Compacts by resolution rather than legislation. Courts may not interfere with the legitimate exercise of discretion by the Legislature.

> It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them[.] *Detroit v Hosmer*, 79 Mich 384, 387; 44 NW 622 (1890).

Thus, this Court should not disturb the Legislature's decision to approve the Compacts by concurrent resolution.

V. THIS COURT'S DECISION IN *BLANK* DOES NOT CONTROL THIS CASE

A. *Blank* Is Not Controlling

TOMAC argues that whether the Compacts are "legislation" must not be determined by this Court's well-established law distinguishing contracts from legislation; rather, TOMAC urges application of the three-part test utilized by the lead opinion in *Blank v Department of Corrections*, 462 Mich 103; 611 NW2d 530 (2000), which that opinion adopted from *Immigration &*

Naturalization Service v Chadha, 462 US 919; 103 SCt 2764; 77 L Ed 2d 317 (1983). *Blank* involved a "legislative veto" of administrative rules, a radically different sort of action by the Legislature than what is involved here. For that reason, the *Chadha* analysis utilized in *Blank* should not be extended to this case.

In *Blank*, this Court reviewed the constitutionality of §§45 and 46 of Michigan's Administrative Procedures Act. These provisions required a joint legislative committee or the Legislature itself to approve new administrative rules. In a plurality opinion, this Court held that §§45 and 46 violated the enactment and presentment provisions of the Michigan Constitution, Const 1963, art 4, §26 and §33, respectively, and, thus, the separation of powers provision as well.[24]

The lead opinion framed the issue in *Blank* as follows: "The issue here is whether the Legislature, upon delegating such authority [to executive agencies to adopt rules and regulations], may retain the right to approve or disapprove rules proposed by executive branch agencies." 462 Mich at 113. The lead opinion resolved this issue by applying the analysis utilized in *Chadha*, which held that a federal statute that allowed the House of Representatives to override the Attorney

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[24]The *Blank* plurality decision is not binding on this Court. "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on this Court under the doctrine of *stare decisis*." *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976). Six justices participated in *Blank*, Justice Taylor not being involved. Justice Kelly's lead opinion, which follows the *Chadha* approach, was joined by Justices Corrigan and Young. Chief Justice Weaver's concurrence did not make the lead opinion binding because she joined only in the lead opinion's "holding and result", not in the reasoning supporting them. 462 Mich at 130. *See*, *People v Scarborough*, 189 Mich App 341, 344; 471 NW2d 567 (1991) *lv den* 439 Mich 950 (1992) (plurality opinion is not binding precedent where "a majority of the justices failed to concur on the exact reasoning for the holding,"). Justice Markman "concurred] in the result reached by the lead opinion" but wrote separately because "I do not agree with the lead opinion's reliance on the rationale from [*Chadha*]." 462 Mich at 130. Justice Cavanaugh filed a dissent. Since no majority of the justices adopted the lead opinion's reasoning based on *Chadha*, *Blank* is not binding on this Court.

General's decision to suspend the deportation of an individual violated the enactment and presentment provisions of the federal Constitution.

The reason why *Chadha* applied to the statute involved in *Blank* is the subject of an entire section of the lead opinion. That section concludes as follows: "In essence, pursuant to §§45 and 46 [of the APA], the Legislature has the power to render illusory its delegation of rule making authority. Therefore, I find that the provisions of the APA at issue in this case are similar to the legislative veto struck down in *Chadha*." 462 Mich at 115.

As the lead opinion's explanation makes clear, the *Chadha* analysis applies to the legislature's power "to render illusory the delegation of rule making authority"; that is, the power to alter or amend the statute granting such authority. Obviously, no such "legislative veto" is involved in this case. Prior to approving the Compacts, the Legislature had not — and could not have —"delegated" any authority over tribal gaming to any branch of State government. The Compacts, therefore, did not "veto" any delegated authority. Consequently, the *Chadha* analysis of a "legislative" act that may have applied to the statutory provisions involved in *Blank* has no application to the Compacts.

B. The Lead Opinion's Analysis In *Blank* Does Not Establish That The Compacts Are Legislative In Nature

Even if the three-part *Chadha* analysis were forced to fit the facts of this case, it would produce the same result as the Court of Appeals' opinion. First, the Compacts do not give the Legislature the *power* to alter the rights, duties and relations of parties outside the legislative branch because the Tribes did not agree to any extension of State law. Second, the Compacts do not involve policy determinations that must be in the form of legislation. As *Blank* recognized, not all policy

determinations must take that form. Finally, the Compacts do not "supplant" other legislative methods of achieving the same result because Congress has dictated that the tribal-state compact is the *only* method that a state may use in affecting the terms on which an Indian tribe may conduct Class III gaming.

1. The Compacts Do Not Give The Legislature The Power To Alter The Rights, Duties And Relations Of Parties Outside The Legislature

In *Blank*, the lead opinion concluded that §§45 and 46 of the APA gave the joint committee on administrative rules ("JCAR") or the Legislature itself the "power to alter the rights, duties, and relations of parties outside the legislative branch." 462 Mich at 116. This power could, by blocking the implementation of rules promulgated by the Department of Corrections ("DOC"), "interfere with the duty of the director [of the DOC] to administer the department", a duty created by the Legislature and codified by statute. 462 Mich at 116. Since the director is a person outside the legislative branch, interference with his duties, the lead opinion concluded, renders the authority of the JCAR or the Legislature under §45 and §46 of the APA "legislative in nature." *Id.*

No such analysis can be made here. The Compacts do not give the State the *power* to alter the rights, duties or relations of anyone. That is because the only way that an IGRA compact can confer such "power" on the state is if a tribe agrees to subject itself to the civil or criminal jurisdiction of the state. Here, of course, the Tribes never made such an agreement.

TOMAC's arguments on this prong of the *Chadha* analysis are completely unpersuasive. First, TOMAC argues that various "rights" are created by the Compacts, such as the State's right to inspect tribal facilities and records and to receive payments from the Tribes. But these rights are merely creatures of contract. The State is given no "power" to enforce them. Indeed, like any party

to a contract, the State, if it wishes to enforce such rights, must utilize the contract's dispute resolution procedure (Compacts, §7; App at 42b-43b) or pursue other available legal remedies.

Second, TOMAC argues that the Compacts "bind" the State and, since the State involves more than the Legislature, it binds those outside the Legislature as well. This argument deceptively trades on the ambiguity in the word "bind". The Compacts "bind" the State just like any contract binds a party to it — a party is bound because it agreed to abide by the contract's terms. But the Compacts do not "bind" the State in the way that legislation "binds" those who are subject to its power; such persons must follow the law whether they agree to do so or not.

Third, TOMAC argues that the Compacts impose duties on the Tribes to restrict their casinos to a specific area outside of Detroit and to restrict the Tribes from having land taken into trust in this area. But the Tribes have these duties, not through the exercise of State legal authority, but because they *agreed* to abide by these restrictions.

Finally, TOMAC argues that the Compacts impose duties on local units of government to create Local Revenue Sharing Boards. But, as shown above, the Compacts do not require local government units to set up these boards; they merely establish the boards as conditions to receiving the tribal payments.

2. The Compacts Do Not Make Policy Determinations That Require Legislation

The second prong of the *Chadha* analysis considers whether the action in question makes policy determinations. Policy determinations may fall within the province of the Legislature. *But not all policy decisions made by the Legislature must be in the form of legislation.* In *Blank*, the lead opinion and the dissent agreed that "not every action resembling legislation requires the passing of

a law[.]" 462 Mich at 117 n 8. *See also* 462 Mich at 165 ("Michigan law recognizes that actions that are 'legislative' in nature do not necessarily constitute 'legislation'.") (Cavanaugh, J.) In particular, policy determinations, although they may look "legislative", do not necessarily amount to "legislation." "The question is not simply whether the Legislature is engaged in making policy determinations, but whether the Legislature is making the type of policy determinations that need to be made in the form of legislation." 462 Mich at 103 (Cavanaugh, J.) Justice Kelly found that the Legislature's "reserv[ing] to itself the power to block agency rules" was "legislation" because it "exerts a 'policy-making effect *equivalent to amending or repealing existing legislation.*'" 462 Mich at 117 n 8, quoting *New Jersey General Assembly v Byrne*, 90 NJ 376, 388; 448 A2d 438 (1982) (emphasis in original).

Federal law mirrors this Court's recognition that not all policy determinations are "legislative". In *Yakus v United States*, 321 US 414, 424; 64 S Ct 660; 88 L Ed 834 (1944), the United States Supreme Court stated that "[t]he essentials of the legislative function are the determination of the legislative policy and *its formulation and promulgation as a defined and binding rule of conduct*[.]" (Emphasis supplied.) "By emphasizing policy formulation, the Court [in *Yakus*] impliedly concentrated on rules of general applicability." *Visser v Magnarelli*, 542 F Supp 1331, 1333 (NDNY, 1982).

Where an action of a legislative body neither promulgates a legislative policy as a defined and binding rule of conduct nor applies it to the general community, it is not "legislation". In *Bateson v Geisse*, 857 F2d 1300 (CA 9, 1988), the court held that a city council's decision to withhold a building permit, although motivated by an official policy, was not legislative in nature. The court reasoned that the decision "neither applied to the general community, nor involved the

promulgation of legislative policy as a defined and binding rule of conduct." *Id.* at 1304.

The action involved here was the Legislature's approval of Compacts with four Indian Tribes. That approval, even if motivated by policy considerations, was not a "promulgation of a legislative policy as a defined and a binding rule of conduct", since, *without the Tribes' approval as well, the Compacts would have no force*! Thus, the Legislature's action approving the Compacts is not rendered legislative in nature simply because policy considerations may have influenced it. *See also Boerth*, 152 Mich at 659 (quoting *City of Indianapolis v Gas-Light & Coke Co*, 66 Ind 396 (1879)) (city's power to make a contract included "the right to make it according to its own discretion as to its prudence *or good policy*[.]" [Emphasis supplied.]).

Where, as here, a governmental unit has no choice but to implement its policy goals through a contract, there is even more reason to view the contract as not being "legislation". That point was made in *Kalamazoo v Circuit Judge, supra*, 200 Mich 146; 166 NW 998 (1918). In that case, this Court struck down a city ordinance fixing the rates that the local electric company charged its customers and providing penalties for its violation. Neither the Michigan Constitution nor any statute gave a municipality the power "to enact an ordinance fixing rates to be enforced by penalties." 200 Mich at 159. But "the want of power to legislatively fix a rate does not prevent the execution of a contract[.]" *Id.* The reason is that "the power to regulate as a governmental function, and the power to contract for the *same end*, are quite different things. One requires the consent of the one body, the other the consent of two." *Id.*, 200 Mich at 159-160 quoting *City of Noblesville v Noblesville Gas & Improvement Co*, 157 Ind 162; 60 NE 1032 (1901) (emphasis supplied). This Court then went on to quote with favor the following passage from *City of Detroit* v *Railway Co*, 184 U.S. 368, 385-386; 22 SCt 410; 46 LEd 592, 607 (1901).

> It is plain that the legislature regarded the fixing of rate of fare over these street railways *as a subject for agreement between the parties and not as an exercise of a governmental function of a legislative character* by the city authorities under a delegated power from the legislature. 200 Mich at 160 (emphasis supplied).

This Court's analysis in *Kalamazoo* is directly applicable here. Theoretically, a compact or legislation regarding Indian gaming might achieve the "same end" for the State. But Congress, which has plenary power over Indian affairs, decided that a state, like Michigan, which allows Class III gaming, may not *legislate* to achieve its policy goals; rather, it can only *compact* with a tribe to achieve its ends. In short, Congress regarded the terms under which Indian gaming is to be conducted "as a subject for agreement between the parties and not as an exercise of a governmental function *of a legislative character*."

TOMAC studiously ignores the well-grounded principle that not all policy decisions must take the form of legislation. Indeed, it offers nothing to show that implementing the specific policies that it identifies requires passage of a law.

First, TOMAC argues that the manner in which tribal gaming is conducted, including the minimum age of casino patrons, is a policy decision requiring legislation because it is an "exception" to the general prohibition against gambling. But there is no Michigan law prohibiting gaming on tribal lands; such gaming is governed exclusively by *federal* law. As noted above, the Legislature itself has recognized that, unless authorized by federal law, it cannot regulate gaming on tribal lands. *See* MCL 432.203(5).

Second, TOMAC argues that the Compacts contain an "extensive regulatory scheme." However, as shown above, *the Tribes* are responsible for regulating their own casinos. Tribal regulation was expressly anticipated by federal law. IGRA provides that "Indian tribes have the

exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 USC §2701(5). Since the State is not involved in regulating the casinos, the tribal "regulations" to which the Tribes agreed are hardly "hallmarks" of legislation as TOMAC contends.

Third, TOMAC argues that policy considerations played a role in the Legislature's decision that the State's civil and criminal gaming laws shall not apply to tribal gaming and that the State shall not have jurisdiction to enforce such laws on tribal lands. The fact that the Compacts do not extend State law and jurisdiction to tribal gaming is one of the principal reasons that the Compacts are *not* legislation. Policy considerations may have played a role in the Legislature's approval of Compacts that lack an extension of State law and jurisdiction; but that does not miraculously convert the Compacts into "legislation". Such a result would indeed be ironic if the Legislature decided to approve the Compacts by resolution precisely because they did not extend State law or jurisdiction to tribal gaming.

New Mexico v Johnson, *supra*, relied upon by TOMAC, is clearly distinguishable because the New Mexico legislature was not involved at all in determining the balance between the state and tribal jurisdiction. As the court stated, "[a]ll of this has occurred in the absence *any* action on the part of the legislature." *Id*, 120 NM at 574; 904 P2d at 23 (emphasis in original). While the court said that striking this balance is a "legislative function", the legislature performs that function if it acts to "ratify his [the Governor's] actions with respect to a compact he has negotiated[.]" *Id.* Of course, the Michigan Legislature "ratified" the Compacts negotiated by then-Governor Engler when it approved them by concurrent resolution.

Finally, TOMAC argues that the Compacts are legislative in nature because they require that the Tribes pay 8% of their net win from electronic games of chance to the MSF. TOMAC asserts that this provision usurps the Legislature's role of appropriating and utilizing State revenues. This is nothing more than an assertion that the Compacts violate the Appropriations Clause of the Michigan Constitution, article 9, section 17. This issue has never before been raised by TOMAC in this litigation; it may not do so for the first time in this Court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Furthermore, as TOMAC admits, the argument was rejected in *Tiger Stadium*, *supra*, 217 Mich App at 439, which correctly found that payments to an entity statutorily authorized to accept gifts (*i.e.*, the MSF), were not subject to article 9, section 17's requirement that funds be expended from the State Treasury only by legislative appropriation — funds paid to the MSF are never held by the State Treasury.

3. The Resolution Approving The Compacts Did Not Supplant Other Modes Of Action By The Legislature

In *Blank*, the lead opinion concluded that JCAR's failure to approve the DOC's proposed rules supplanted "other legislative methods for achieving the same result" because, in the absence of §§45 and 46, "the only way that the Legislature could influence the promulgation of the rules would be to enact new legislation." 462 Mich at 117. This conclusion resulted from the lead opinion's determination that JCAR's action had the effect of "amending or repealing existing legislation", that is, legislation giving the DOC rule-making authority. 462 Mich at 117 n 8.

No such analysis is possible here. The Legislature's approval of the Compacts by resolution did not "amend" or "repeal" any Michigan statute since there was no State statute governing tribal gaming. The legal effect of the Compacts derives from federal law — the Compacts satisfy one of

the three conditions required by IGRA for the legal operation of Class III gaming on tribal lands.

Furthermore, the Legislature's use of a concurrent resolution to approve the Compacts did not replace the bill procedure for the approval of a gaming compact. Resolutions are regularly used to approve government contracts. *See, e.g., Case v Saginaw, supra.* More specifically, tribal-state gaming compacts in Michigan have always been approved by concurrent resolution.

Finally, TOMAC asserts that Michigan has always approved interstate compacts by legislation. As argued above, interstate compacts and the IGRA Compacts involved here are very different. Interstate compacts typically impose affirmative obligations on the state. (*See*, Exhibit A to Intervenor's Brief.) The gaming Compacts, however, do not require the State to undertake any affirmative duties. Furthermore, "historical practice [for the approval of compacts] . . . is not controlling." *US Steel*, 434 US at 471.

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The *Chadha* analysis adopted by the lead opinion in *Blank* confirms the Court of Appeals' holding that the Compacts are not "legislation". The Compacts give no power to the State to unilaterally alter anyone's rights or duties. Any policy determinations underlying the Legislature's decision to approve the Compacts were not promulgated as a binding rule of conduct generally applicable to the community and IGRA forbids the State from unilaterally applying its policies to tribal gaming in the form of legislation. Finally, approval of the Compacts by concurrent resolution did not supplant legislation since the Compacts did not amend or repeal any Michigan law and, in any event, tribal-state gaming compacts, like other government contracts, have been traditionally approved by resolution.

Under *Blank*, as well as this Court's precedent clearly distinguishing between contracts and

legislation, the Compacts are not "legislation". Thus, the Court of Appeals correctly held that approval of the Compacts by concurrent resolution did not violate Const 1963, art 4, §22. This Court should affirm that holding.

VI. THE AMENDMENT PROVISION OF THE COMPACTS DOES NOT VIOLATE THE SEPARATION OF POWERS CLAUSE

TOMAC asserts that the amendment provision of the Compacts, which allows the Governor to agree on behalf of the State to amend the Compacts, violates the Separation of Powers Clause of the Michigan Constitution, Const 1963, art 3, §2. TOMAC is wrong.

The Separation of Powers Clause provides that, "[t]he powers of government are divided into three branches; legislative, executive and judicial." Const 1963, art 3, §2. This provision does not "mean that the branches must be kept wholly separate." *Soap & Detergent Ass'n v Natural Resources Comm'n*, 415 Mich 728, 752; 330 NW2d 346 (1982). Rather, "[t]he true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments[.]" *Local 321, State, County & Municipal Workers of America v City of Dearborn*, 311 Mich 674, 677; 19 NW2d 140 (1945) quoting Story's *Constitutional Law* (4th Ed).

TOMAC asserts that the amendment provision violates the Separation of Powers Clause because it permits the Governor to agree to an amendment of a compact without legislative approval of that specific amendment. Since some amendments may reflect "policy choices", TOMAC reasons, the Governor's agreeing to an amendment without legislative approval is tantamount to "legislation". TOMAC's reasoning is fatally flawed.

First, the mere possibility that the Governor might choose to agree to amendments that would

convert the present Compacts, which are not legislative in nature, into "legislation" does not support TOMAC's separation of powers challenge. TOMAC's challenge is a *facial* one. It could only make such a challenge because, at the time TOMAC filed its Complaint, the Governor had not amended the Compacts, a situation that existed until the Little Traverse Amendment was accepted by the Governor on July 22, 2003.[25]

In order to succeed on its facial challenge, TOMAC has to show more than that a particular amendment is unconstitutional; it has to establish that *no* amendment would pass constitutional muster. The party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the [a]ct would be valid." *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999) quoting *United States v Salerno*, 481 US 739, 745; 107 SCt 2095; 95 LEd 2d 697 (1987).

TOMAC does not even try to show that each and every amendment to the current Compacts

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[25]If TOMAC's challenge is not a facial one, then, as the Court of Appeals concluded, it was not ripe for review. In that situation, TOMAC's claim would be based on its speculation as to what amendments "could" be agreed to by the Governor. But "[c]onstitutional questions are not to be dealt with in the abstract." *General Motors v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940). "Where a constitutional question is presented anticipatorily, the Court is required by the limits on its authority to decline to rule." *Straus v Governor*, 459 Mich 526, 545; 592 NW2d 53 (1999) *citing Sullivan v Bd of Dentistry*, 268 Mich 427, 429-430; 256 NW 471 (1934). *See also BCBS v Milliken*, 422 Mich 1, 87; 367 NW2d 1 (1985).

The Little Traverse Amendment does make such an abstract challenge ripe. At most, the amendment itself would be subject to review. But TOMAC does not and cannot make such a challenge in this case since no lower court has had the opportunity to rule on the constitutionality of the Little Traverse Amendment. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc. v University of Michigan Board of Regents, supra*, 444 Mich at 234. In that regard, TOMAC's criticisms of the Little Traverse Amendment on pages 43 and 44 of its brief and the request by *amici curiae* Senate Majority Leader Ken Sikkema and Senate Appropriations Committee Chairperson Shirley Johnson to invalidate the Little Traverse Amendment are irrelevant to this case and should be disregarded by this Court.

would convert them from contracts into legislation. Instead, TOMAC merely uses the Little Traverse Amendment as an illustration of what it considers to be "policy choices" that are legislative in nature. But the mere "fact that the . . . act might operate unconstitutionally under some conceivable set of circumstances is insufficient. . ." *Straus*, 459 Mich at 543.

Clearly, the Governor could agree to amend the Compacts in ways that would not involve the type of policy decision that would render an amended Compact legislation. For example, amending the notice provision (Section 13; App at 46b) would hardly involve establishing such a policy. Nor would minor adjustments to the dispute resolution process (Section 7; App at 42b-43b). Since there are many amendments that would not require legislation, TOMAC's facial constitutional challenge to the amendment provision must fail.

Second, to the extent that the Compacts "grant" authority to the Governor, it is not the power to impose legislation. TOMAC's argument that the Governor makes a policy determination by agreeing to an amendment is largely illusory. Clearly, the Tribes and the State have already determined those amendments that are permissible, namely, those amendments that do not change the definition of "eligible Indian lands". (Compacts, §16(A)(iii); App at 47b.) The Governor can only choose within this defined range the amendments to which the State will actually agree.

Finally, the Governor's discretion to agree to an amendment within the permissible range should be accorded great deference. Matters are left to the Governor, as opposed to a subordinate in the executive branch, because "his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance" than would be expected from a subordinate. *Sutherland v Governor*, 29 Mich 320, 323 (1874) (Cooley, J.). Thus "the Governor's decision . . . is entitled to great deference, for the Governor has no less a solemn obligation . . . than

does the judiciary to consider the constitutionality of his every action." *Lucas v Wayne County Board of County Road Commissioners*, 131 Mich App 642, 663; 348 NW2d 660 (1984). Anything less would "run afoul of the separation of powers principle of Const 1963, art 3, §2, by virtue of which the executive power is vested solely in the Governor[.]" *Id. See also, Flint City Council v Michigan*, 253 Mich App 378, 392-393; 655 NW2d 604 (2002) ("in light of separation of powers principles, the absence of any limits on the scope of the Governor's review [of a municipality's financial condition] indicates not that the review would be unlimited but that the Legislature intended that the parameters of the review would be left to the Governor to determine.")

Here, both the Tribes and the State agreed that the Governor could choose among the types of amendments deemed acceptable by the parties. Conceivably, some amendments may require legislation, such as an amendment extending State law to tribal gaming. If such an amendment were accepted, the Governor, who is bound to uphold the Constitution, would be expected to seek appropriate legislation. To deprive the Governor of such discretion would, as *Lucas* recognized, "run afoul of the separation of powers principle."[26]

VII. THE COMPACTS DO NOT VIOLATE THE LOCAL ACTS PROVISION

TOMAC contends that the Compacts are "legislation" that is "local" and, therefore violated the Local Acts provision, Const 1963, art 4, §29. The Court of Appeals rejected this claim on the ground that the Legislature cannot regulate gaming on Indian lands. Thus, the Compacts are not "legislation" to which the Local Acts provision would apply. In any event, TOMAC's argument falls for another reason: the Compacts are simply not "local" in nature.

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[26]Even if the amendment provision violates the Separation of Powers Clause, the rest of the Compact survives since the amendment provision is severable. *See* Compacts, §12(E) (App at 45b).

TOMAC argues that the placement of casinos within specified "eligible Indian lands" renders the Compacts "local." That is not so. All potential tribal gaming is not confined to "eligible Indian lands." The Tribes may still apply to the Secretary of the Interior to take lands outside of "eligible Indian lands" into trust for gaming purposes. (Compacts, §9; App at 44b.) Because the Compacts do not geographically restrict all of the Tribes' potential gaming activities, the Tribes' agreement to open their initial casinos within specified "eligible Indian lands" does not make the Compacts "local" in nature. *See Attorney General ex rel Eaves v State Bridge Commission*, 277 Mich 373, 378; 269 NW 388 (1936) (holding that statute creating state bridge commission authorized to operate and maintain public works, including the international bridge at Port Huron, was not a local act because, in part, "[t]he scope of the act is not limited to an international bridge and ferries at or near Port Huron although it does embrace such objects.").

Furthermore, compacting with a tribe is, under IGRA, a function of the state, not local governments. Under Michigan law, legislation that performs a state function is not a "local act" even if it is directed to a specific location. *See, e.g., Hart v Wayne County*, 396 Mich 259, 272; 240 NW2d 697 (1976) (legislation authorizing funding of Detroit's recorder's court "is not a local act" because "[r]ecorder's court is a state court performing a state function, not a local function.").

For these reasons, the Compacts are not "local" and therefore do not fall within the Local Acts provision of the State Constitution.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly determined that the Legislature's approval of the Compacts by resolution did not violate of the Michigan Constitution. Under federal law, Michigan cannot unilaterally regulate tribal casinos; it can only negotiate the terms of such gaming in a compact. The Compacts at issue here are bi-lateral contracts that grant no regulatory power to the State and create no agency or other public body. Thus, the Compacts are not legislation requiring approval by bill; a concurrent resolution was sufficient. Furthermore, the Local Acts provision does not apply to the Compacts since that constitutional provision is limited to legislation. Finally, the amendment provision of the Compacts is not unconstitutional on its face since its application does not invariably result in amended Compacts that are "legislation". Moreover, the provision itself delineates the amendments to which the Governor may agree, and the exercise of her discretion in that regard should be accorded great deference by the courts.

Because the Court of Appeals correctly resolved the constitutional issues presented by this case, the State requests that this Court affirm its decision.

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DATED: December 23, 2003

0263076.04